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Supreme Court, U.S.
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No. 00-1208

In The

Supreme Court of the United States

DEMETRIC NELSON, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, ASHLEY NICOLE NELSON,

Petitioner,

versus

NOTTO & HILLIARD CONTRACTING SERVICES, INC. AND MCDERMOTT INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To The Honorable Supreme Court Of The State Of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is somewhat accurate, but the undisputed, pertinent facts are few. On February 27, 1996, petitioner, Demetric Nelson, was hired by Notto & Hilliard Contracting Services, Inc. as a fitter's helper. He was immediately "loaned" to McDermott, Inc. throughout the duration of his employment until his accident on April 9, 1996. During the forty-two (42) days of his employment, petitioner performed refurbishment-type work aboard an offshore drilling rig docked in McDermott's yard. Initially, the rig was located on land; however, after fifteen (15) days, the rig was transferred via crane on to a flat deckbarge moored in McDermott's slip in navigable waters. After assisting the "load out" crew in securing the rig to the deckbarge, petitioner returned to his usual refurbishment-type duties aboard the vessel until the time of his accident.

Initially, the Louisiana Workers' Compensation Corporation ("LWCC"), as Notto & Hilliard's insurance carrier, filed a Notice of Controversion with the United States Department of Labor indicating jurisdiction was under investigation. Nevertheless, LWCC instituted benefits under the LHWCA. Shortly thereafter, petitioners filed suit against respondents claiming, among other things, that petitioner was not a covered employee under the LHWCA.

The trial court, Louisiana First Circuit Court of Appeal and the Louisiana Supreme Court all agreed with respondents in finding LHWCA coverage under *Perini*,[1]

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[1] *Director, Office of Workers' Compensation Programs v. Perini North River Association*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed. 2d 465 (1983).

since petitioner was injured on a vessel in navigation while performing his required job-tasks. Furthermore, all lower courts rejected petitioners' argument that he was "transiently or fortuitously" on the vessel at the time of his injury. It is on these issues that petitioners seek relief.

SUMMARY OF THE ARGUMENT

All lower courts held petitioner satisfied the "situs" and "status" requirements of the LHWCA, since petitioner was injured while working aboard a vessel in navigation. During at least three (3) out of the six (6) weeks of his total employment, petitioner performed 100% of his required job duties aboard a vessel in navigation. Based upon this Court's decision in *Perini, infra,* petitioner easily satisfied the situs and status requirements and therefore is covered under the LHWCA. Nor has petitioner satisfied the "transient or fortuitous" exception since petitioner was required to carry out all of his job-tasks aboard the vessel in navigation for a substantial period of time.

Finally, petitioners' have failed to show any conflict whatsoever between the Fifth and Eleventh Circuits. The *Bienvenu*[2] and *Brockington*[3] decisions are consistent on all issues with almost identical holdings. Accordingly, this Honorable Court should deny petitioners' Writ of Certiorari.

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[2] *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999).

[3] *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990).

ARGUMENT

MAY IT PLEASE THE COURT:

Assignment of Error Numbers 1 and 2: **Whether a worker injured on actual navigable waters must satisfy both a status and situs requirement to be covered under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). Whether all injuries occurring on actual navigable waters are covered by the LHWCA.**

It is undisputed that petitioner was employed with defendants as a fitter's helper from February 27, 1996 through April 9, 1996, (42 days) during which time plaintiff performed refurbishment-type work aboard an offshore drilling rig docked in McDermott's yard and awaiting transport to a location in the Gulf of Mexico. During the first fifteen (15) days of plaintiff's employment, the rig was located on land in McDermott's yard. Over the next two (2) or three (3) days, the rig was transferred via crane onto a flat deckbarge moored in McDermott's slip in navigable waters. After assisting the "load out" crew in securing the rig to the deckbarge, petitioner returned to his usual refurbishment-type duties aboard the vessel for at least twenty-one (21) additional days. On April 9, 1996, petitioner slipped on a welding rod left on the rig by one of his co-workers, spawning this legal battle.

Based upon these simple, undisputed facts, all lower courts correctly limited petitioner's remedy to compensation under the LHWCA, 33 U.S.C. 901, et seq., since petitioner was injured aboard a vessel in navigable

waters while performing his normal job duties as a fitter's helper. Despite the fact that petitioner worked almost two-thirds (2/3) of his total time with respondents aboard the deckbarge moored in McDermott's slip in navigable waters, petitioner now maintains his presence aboard the vessel at the time of his injury was "transient or fortuitous" thereby excluding him from coverage under the LHWCA. Just as respondents convincingly argued to all lower courts, this Court's seminal decision in *Director, Office of Workers' Compensation Programs v. Perini North River Association*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed. 2d 465 (1983) mandates the same result – a finding that petitioner, who was injured after working almost two-thirds (2/3) of his time aboard a vessel in navigable water, is a worker covered under the LHWCA.

Prior to 1972, workers injured during the course of their employment upon navigable waters were subject to coverage under the LHWCA without any further showing; however, the LHWCA did not extend to injuries occurring on land, regardless of the workers' duties. In 1972, Congress amended the LHWCA to extend "coverage to more workers by replacing the single-situs requirement with a two-part situs and status standard." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). Based upon years of jurisprudence, led by this Court, it has been firmly established that the purpose of the 1972 amendments was to ***extend coverage landward*** and not to exclude benefits to those workers who would have been covered prior to the 1972 amendments because they were injured on navigable waters. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424, 105 S.Ct.

1421, 1428, 84 L.Ed. 2d 406 (1985); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 97 S.Ct. 2348, 2362, 53 L.Ed. 2d 320 (1977); *Pfeiffer*, 444 U.S. at 75, 100 S.Ct. at 33; *Perini*, 459 U.S. at 323-324, 103 S.Ct. at 650-651.

In *Perini*, Raymond Churchill was employed in the construction of a sewerage treatment plant extending over the Hudson River. Churchill's job was to supervise operations on a cargo barge and he was injured while standing on the deck of the barge. *Id.* at 300. This Court held that Churchill was "engaged in maritime employment" for purposes of coverage under the amended LHWCA because he was injured while working on actual navigable waters in the course of his employment, and would have been covered under the pre-1972 LHWCA. *Id.* at 324.

This Court then discussed with favor three of its pre-1972 cases to illustrate the scope of the Act's coverage prior to the amendments. *Id.* at 307-12, 103 S.Ct. at 642-45. Of significance, this Court cited with approval its prior decision in *Parker v. Motor Boat Sales*, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184 (1941). In finding that the plaintiff, Armistead, was covered under the LHWCA, this Court found that coverage would not be denied because "habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river . . . " *Id.* at 247, 62 S.Ct. at 223. Based upon the pre-1972 Act, along with well-established case law including the above, it is therefore unassailable that in the present matter, petitioner has easily satisfied the situs requirement since he was injured while carrying out his regular duties aboard a vessel in navigation.

As to the newly amended ***status*** requirement of the post-1972 LHWCA, the *Perini* Court then held:

> "In holding that we find no congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon the actual navigable waters in the course of their employment, we emphasize that we in no way hold that congress meant for such employees to receive LHWCA coverage merely by meeting the situs test, and without any regard to the 'maritime employment' language. ***We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA,*** providing, of course, that he is the employee of a statutory "employer," and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, ***but because they are required to perform their employment duties upon navigable waters.***" (emphasis added).

Following this Court's holding, the Court references footnote 34, which states, in pertinent part, as follows:

> "Our holding, of course, extends only to those persons 'traditionally covered' before the 1972 amendments. We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters, or to a land-based worker injured on land who then falls into actual navigable waters. Our decision today should not be read as exempting water-based

> workers from the new status test. Rather, our holding is simply a recognition that a worker's performance of his duties upon actual navigable waters is necessarily a very important factor in determining whether he is engaged in 'maritime employment.' "

Respondents respectfully contend that in addition to satisfying the situs requirement, petitioners have easily satisfied the status requirement as set forth in *Perini*. Petitioner's job required that he work more than three (3) weeks aboard a rig attached to a vessel in navigation. This amounts to almost two-thirds (2/3) of the entire time he worked for respondents. Because he was ***required to perform his duties on a vessel in navigation***, petitioner satisfies the status requirement as defined by this Court. Since situs and status are both satisfied, petitioner is covered under the LHWCA.

Respondents further contend the lower courts considered, and rightfully rejected petitioner's argument that his time spent aboard the deckbarge was "transient or fortuitous" as mentioned in footnote 34 above. To date, this Court has left to the lower courts the task of defining and refining workable definitions of the terms "transient or fortuitous." Recently, our learned judges in the fifth circuit, a circuit well acquainted with maritime and LHWCA issues, had the opportunity to provide some salient guidance on this issue in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999).

The *Bienvenu* court, sitting en banc, followed *Perini's* mandate in holding that a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test where his

presence on the water at the time of his injury was neither transient nor fortuitous. *Id.* at 908. Of significance, the court found the plaintiff in *Bienvenu* spent approximately 8.3 percent of his work time actually performing job responsibilities on navigable water. While the *Bienvenu* court technically declined the opportunity to define the terms "transient or fortuitous" in this context, the court held that a worker injured on the water who performs a "not insubstantial" amount of his work on navigable waters is covered under the LHWCA. *Id.* The court also offered the following guidance:

> "First, the threshold amount must be greater than a modicum of activity in order to preclude coverage to those employees who are merely commuting from shore to work by boat. Also, the routine activity of assisting in tying the vessel to the dock and loading or unloading one's tools and personal gear onto the vessel do not count as meaningful job responsibilities. Moreover, we agree with the Supreme Court in *Herb's Welding* that there is a substantial difference between a worker 'performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land based but who takes a boat to work.' (Citations omitted). The time *Bienvenu* actually worked on production equipment aboard the MISS JACKIE constituted 8.3 percent of his time at work. This is not an insubstantial amount of *Bienvenu's* work time and is sufficient to trigger LHWCA coverage." *Id.*

The holding in *Bienvenu* is consistent with a plethora of other Fifth Circuit decisions deciding the issue of jurisdiction under *Perini*. See *Fontenot v. AWI, Inc.*, 923

F.2d 1127 (5th Cir. 1991); *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987); *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264 (5th Cir. 1986); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986); *Thornton v. Brown & Root, Inc.*, 707 F.2d 149 (5th Cir. 1983).

Respondents respectfully submit the petitioner has easily satisfied *Bienvenu's* "not insubstantial" test since petitioner was required to perform 100 % of his duties on a vessel in navigation over a substantial period of time. For more than three (3) weeks, petitioner performed all of his work-tasks aboard a vessel in navigation. Based upon these undisputed facts, it is now ludicrous to suggest that petitioner's presence aboard the vessel at the time of his accident was transient or fortuitous.

Based upon the overwhelming statutory and case law in support of respondents' position, it is no wonder petitioners' have failed to cite a single case in support of their position that petitioner's work aboard the deckbarge in navigation was transient or fortuitous. Petitioners instead attempt to concoct a split in the Federal Fifth and Eleventh Circuits by arguing the *Bienvenu* decision conflicts with the eleventh circuit's decision in *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990); *writ denied.* Respondents submit a cursory review of the facts in *Brockington* proves that no such conflict exists.

In *Brockington*, the court framed the issue: "whether, at the time of his injury, Brockington was engaged in maritime employment sufficient to fulfill the 'status' requirement." *Id.* at 1528. The plaintiff in *Brockington* was employed as a land-based journeyman electrician for

more than ten (10) years with his employer, Certified. His duties primarily consisted of wiring houses and commercial and industrial buildings. He also dug ditches, ran conduit, pulled cable and wired electrical fixtures. On the job of injury, Certified had contracted with the University of Georgia to do wiring work at a marine laboratory being built on Sapelo Island off the coast of Georgia. The lab was being built entirely upon land. Because there was no bridge to the island, workers were required to travel to the island aboard the "Sapelo Queen" ferry. Due to difficulties with the ferry schedules, plaintiff and a co-worker obtained permission to use a sixteen (16) foot motorboat to travel to and from the island. On his first trip to the island in the motorboat, plaintiff was injured. Not surprisingly, the eleventh circuit summarily rejected plaintiff's claims of status under the LHWCA, and instead held:

> "The undisputed facts indicate that Brockington was employed by Certified as a land-based electrician. His duties consisted primarily of wiring houses and commercial buildings. Brockington had no connection to traditional "loading and unloading" activity in the course of his employment with Certified or at any other time. There was nothing inherently maritime about his tasks as an electrician, and the "marine environment" in which he was injured had absolutely no connection to the general nature of his employment. It was merely his mode of travel to this particular jobsite. Furthermore, it cannot even be said that Brockington regularly traveled over water to more than two jobsites in the ten years he was employed by Certified. His only connection with the water was the fact that he happened to

> be traveling over it incidental to land-based employment.
>
> Although Brockington was injured on navigable waters, he was not in any sense engaged in loading, unloading, repairing or building a vessel, and his de minimis connection to maritime activity is simply insufficient to fulfill the "status" requirement of the LHWCA. Consequently, Certified's motion for summary judgment on plaintiffs' claim under the LHWCA will be granted."

The *Brockington* court reached the proper decision in finding the plaintiff failed to establish the "status" requirement under the LHWCA ***since plaintiff was injured while transiently or fortuitously upon navigable waters.*** Without question, the Fifth Circuit, relying upon *Bienvenu, Perini* and *Herb's Welding,* would reach the identical holding as the *Brockington* court because the facts clearly establish a true example of the "transient or fortuitous" exception to *Perini* and the Act. In fact, the very holding in *Bienvenu,* citing *Herb's Welding,* refers to the exact factual scenario as in *Brockington,* where a land based worker is injured while taking "a boat to work." Finally, although petitioners argue the *Bienvenu* and *Brockington* cases, and thus the circuit law is in conflict, our fifth circuit judges obviously believe these cases were founded on consistent holdings when the court, in *Bienvenu,* stated, "[w]e join the Eleventh Circuit in reaching this conclusion," referring then to the *Brockington* decision.

CONCLUSION

The undisputed facts and the overwhelming case law support the lower courts' decisions in favor of respondents. Since petitioners have satisfied the situs and status requirements of the LHWCA, this Court should deny petitioners' application for writs of certiorari.

Respectfully submitted,

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